Supreme Court, U.S.
FILED
JAN 6 - 2004
OFFICE OF THE CLERK

(3)

No. 03-585

IN THE

# Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,

*Petitioner,*

*v.*

WILLIAM McEUIN,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## REPLY BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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## I. RESPONDENT HAS FAILED TO PRESENT ANY ARGUMENT OR AUTHORITY THAT DEFEATS CROWN'S PETITION AND HAS MISCHARACTERIZED OR MISCONSTRUED CROWN'S ARGUMENTS AND EVIDENCE.

Crown Equipment Corporation's ("Crown") briefs and arguments in the courts below raised whether the exclusion of relevant, non-cumulative state of mind evidence was proper under Rule 403 and whether the punitive damages award violates the Due Process Clause. (*See* Memorandum in Support of Post-Trial Motions at 2, 14-15, 22-24; Brief of Defendants-Appellants, at 25-26, 30-39; Reply Brief of Defendants-Appellants, at 1-13; Motion for Rehearing.) As respondent points out, Crown has clarified, reframed and refined some of its arguments in its Petition. But Crown has made the same claim raised below – that the trial court failed to perform the proper Rule 403 analysis of its state of mind evidence and that it was crucial, outcome-determinative evidence on the punitive damages issue. The court of appeals then failed to engage in the proper Rule 403 analysis and paid at most scant attention to the trial court's arbitrary ruling. As this case and the precedents cited by Crown in its Petition demonstrate, courts require guidance on the proper application of Rule 403 and the correct standard of review for punitive damages evidence, especially non-cumulative, exculpatory state of mind evidence. There is no doubt that Crown's Petition raises significant issues.

Respondent has inappropriately recast and misconstrued certain issues and arguments raised by Crown. Respondent asserts that Crown has waived its claim that the punitive damages award in this case violates the Due Process Clause because the court failed to properly analyze and admit Crown's relevant state of mind evidence. This Court's precedent, however, holds that an arbitrary punitive damages award violates the Due Process Clause. When punitive damages are at issue the improper exclusion of exculpatory state of mind evidence also violates the Due Process Clause. Respondent claims that Crown has

waived its argument that, pursuant to *Gore* and *Campbell*, the court of appeals should have applied exacting scrutiny to the punitive damages evidence in this case. There could not be a more blatant violation of due process than the wholly inadequate analysis of the punitive damages evidence and the exclusion of Crown's relevant state of mind evidence by both the trial court and the court of appeals. Moreover, in Section II of its Petition Crown directly raises the misuse of Rule 403 without directly implicating the Due Process Clause of the United States Constitution.

Respondent also argues that the district court permitted Crown to introduce sufficient evidence of its state of mind with respect to the design decision at issue. Nothing could be more contrary to the record. Crown will not reargue this point here, however, respondent's opposition mischaracterizes the exclusion of the evidence.[1]

As pointed out in Crown's Petition and the dissent in the Court of Appeals, the district court's injudicious decision left Crown with the equivalent of no probative evidence of its

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1. While, because of the page limitation and the rule against reargument, Crown cannot address each of the mischaracterizations of the record by respondent, it is inconceivable that he claims that, "the trial court did not foreclose Crown from introducing evidence of its state of mind . . ." (Resp.Brief, at 16).

As explained by Judge O'Scanlan in his dissent:

> While the district court allowed Crown's engineer testify that he relied upon the views of outside consultants, the impact of the reports was lost because the jury was not allowed to view them directly. The jury was not allowed to view them directly. The jury was unable to observe that the reports were comprehensive and obviously prepared by exports in the field. Nor was the jury able to view the substance of the reports, which directly supports Crown's contention that it, in good faith, believed the addition of a door would make its forklifts *more* dangerous.

(App. at 22a).

state of mind with respect to its design decision. (*See* App. at 19a-23a). Contrary to respondent's representations, mentioning in a generic manner that Crown consulted reports and specifications did not provide any probative evidence to the jury. Exclusion of Crown's evidence is *per se arbitrary*.

Respondent further claims that Crown argues for a mechanical application of Rule 403. But Crown has advocated a well reasoned, non-mechanical application of Rule 403 that includes consideration of the evidence in light of all the facts and circumstances and heightened scrutiny of punitive damages evidence. Crown's position is that the trial court misapplied Rule 403 and the court of appeals failed to correct this blatant error.

Respondent also attempts to equate the analysis of opinion evidence under Rule 702 and *Daubert* with a Rule 403 analysis of relevant evidence in a punitive damages case. The two raise important issues and involve the judicial gatekeeping function but otherwise are not at all analogous. Respondent's arguments fail to recognize and address Rule 403's status as an extraordinary remedy or the analyses outlined in the various precedents cited by Crown.

## II. THIS COURT CAN AND SHOULD ADDRESS THE SIGNIFICANT AND RECURRING LEGAL AND CONSTITUTIONAL ISSUES REGARDING THE USE OF FEDERAL RULE OF EVIDENCE 403 TO EXCLUDE RELEVANT STATE OF MIND EVIDENCE IN A PUNITIVE DAMAGES CASE.

This Court has jurisdiction to consider Crown's argument regarding the proper application of Rule 403 to the relevant state of mind evidence offered by Crown. Crown's claim that the district court failed to properly analyze and admit this crucial evidence has been made in the trial court and the court of appeals, so there is no waiver nor surprise issue.

This Court has jurisdiction to consider issues that clarify, reframe or refine the claims raised below or were not raised

before the district court or court of appeals. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 (2001); *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245-46, n.2 (2000); *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980). The issues Crown raises are "squarely presented and [will be] fully briefed." *Carlson*, 446 U.S. at 17, n.2. The issues are also important and will recur in cases where punitive damages are at issue. *See Carlson*, 446 U.S. at 17, n.2. Furthermore, parties are not limited to the arguments made in the lower courts once the claims have been presented there. *Harris*, 530 U.S. at 246, n.2.

Here, the claim that the punitive damages award was arbitrary and Crown's evidence should not have been excluded has been presented in the lower courts. (*See* Memorandum in Support of Post-Trial Motions at 2, 14-15, 22-24; Brief of Defendants-Appellants, at 25-26, 30-39; Reply Brief of Defendants-Appellants, at 1-13; Motion for Rehearing.) Crown, in its post-trial motions, argued that the punitive damages award violates the standards this Court established in *BMW v. Gore*. (Memorandum in Support of Post-Trial Motions at 14-15). Crown's arguments in its Petition clarify, reframe, and refine these claims.

This Court may address Crown's claims. In *Martin*, for example, the issue was coverage under Title III of the Americans with Disabilities Act. *Martin*, 532 U.S. at 664-65. Petitioner, PGA Tour, Inc., (1) asserted in the district court that it is a private club exempt from Title III; (2) argued in both the district and appellate court that the competitors' area is not a "public accommodation"; and (3) contended in this Court that competing golfers are not members of the class Title III protects. *Martin*, 532 U.S. at 678. This Court found that, although the PGA Tour did not make the same argument in its Petition that it made in the lower courts, the "Title III coverage issue" was before the lower courts and the Court exercised its discretion to decide it. *Martin*, 532 U.S. at 678, n.27. Ultimately, this Court decided the general issue although it had been argued on various grounds. *See Martin*, 530 U.S. at 678, n.27. This Court further concluded

that "[g]iven the importance of the issue" it could "exercise . . . discretion to consider it." *Martin*, 530 U.S. at 678, n.27.

The overarching issue presented below and here is whether Rule 403 can be used to exclude relevant and non-cumulative state of mind evidence offered in a punitive damages case. (Memorandum in Support of Post-Trial Motions, at 23; Brief of Defendants-Appellants, at 25-26, 30-39; Reply Brief of Defendants-Appellants, at 1-13; Motion for Rehearing). The decision challenged is the misuse of Rule 403 to exclude military specifications and engineering study data offered to rebut respondent's punitive damages evidence and show the jury Crown's design decision-making process for the lift truck at issue. Crown, in its post-trial motions and in the Ninth Circuit Court of Appeals, challenged the district court's erroneous and injudicious decision-making process that resulted in the exclusion of Crown's relevant state of mind evidence and an arbitrary punitive damages award. (*Id.*; Tr. Trans., at p. 306, lns. 11-20). The Ninth Circuit also breezed through its analysis of Crown's evidence and deferred to the district court's erroneous decision to exclude it. (App., at pp. 8a-14a, 18a, 28a-29a). It then failed to recognize the arbitrariness of the punitive damages award based on the character of the evidence offered and unlawfully excluded.[2]

The facts and circumstances of this case squarely present for consideration by this Court each of the issues articulated as Crown's "Questions Presented for Review." There could not be a more blatant violation of due process than the treatment of Crown's relevant state of mind evidence in this case. This is not an unusual or particularly complex case. It is the kind of products liability action that is filed multiple times daily

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2. To support the arbitrary award Respondent argues that purported "lies" allegedly told to James Perry (all of which Crown denies) who was not in any way involved in the purchase of the lift truck at issue provides the foundation. As in *Campbell*, an award based on evidence with no nexus to the conduct at issue can not support a punitive damages award.

throughout the United States. Such cases often involve a claim for punitive damages based on the design decisions made. Thus, this is an excellent vehicle for this Court to clarify the correct use of Rule 403, further develop its punitive damages jurisprudence and protect due process rights by establishing appropriate evidentiary and appellate review standards. These are fundamental questions that only this Court can answer. Without this Court's guidance, under the Ninth Circuit's analysis, arbitrary punitive damages awards will continue to be upheld after exclusion of highly probative and exculpatory state of mind evidence.

## III. THE RULE 403 ANALYSIS IS NOT THE SAME AS THE RULE 702 ANALYSIS AND THE STANDARD FOR PUNITIVE DAMAGES EVIDENCE SHOULD NOT BE THE SAME AS THAT FOR RULE 702 ADMISSIBILITY RULINGS. SUCH A STANDARD IN PUNITIVE DAMAGES CASES WOULD DIRECTLY CONFLICT WITH *GORE* AND *CAMPBELL*.

Respondent has failed to show that the District Court's analysis of the evidence Crown offered for the limited purpose of showing its state of mind was consistent with the purposes of Rule 403 and the Due Process Clause. It is telling that he failed to controvert or distinguish the precedents cited by Crown. Respondent's failure to squarely address Crown's legal arguments reveals the weakness of his position under the applicable law.

Crown does not advocate and has not requested this Court to embrace a "mechanical" application of Rule 403. As Rule 403 is an extraordinary remedy and there are procedural and constitutional limitations on punitive damages awards to prevent arbitrary punishments, Crown proposes an exacting review of the state of mind evidence offered in a punitive damages case. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513, 1519-20 (2003). This is consistent with the

exacting, *de novo* review of a trial court's decision on punitive damages. *Id.* at 1520-21.

Contrary to respondent's arguments, Crown's claim is that Rule 403 cannot be arbitrarily employed to exclude such evidence when it is relevant and non-cumulative. Thus, its proposed standards do not embrace a "mechanical solution" to the problem of prejudice addressed by Rule 403.

The notes to Rule 403 cited by respondent and by this Court in the *Old Chief* case support Crown's position here because these notes instruct courts to perform a thoughtful analysis that includes whether other proof is available. Here, the basis for Crown's appeal and petition to this Court is the District Court's mechanical and myopic consideration of Crown's relevant and highly probative state of mind evidence. Contrary to respondent's unsupportable claims, there was no other equally probative and similar proof available to Crown. It offered such critical evidence for the sole purpose of rebutting respondent's state of mind evidence. Such evidence was not in any way prejudicial and there was no equally probative evidence that would fairly so inform the jury for its punitive damages determination. The trial court should have admitted it and the court of appeals should have applied exacting scrutiny to the trial court's failure to do so. It did not.

Moreover, contrary to respondent's assertions, this case does not present a situation analogous to *Old Chief* or *Joiner*. In *Old Chief*, the Court reviewed the Rule 403 analysis in the context of cases involving proof of felon status. *Old Chief v. United States*, 519 U.S. 172, 183 (1997). While certain general principles in the opinion are helpful, the facts and circumstances are not analogous to those here, which focus on evidence offered to prove Crown's state of mind in a punitive damages case. The constitutional concerns addressed in *Gore* and *Campbell* which are inherent in the Rule 403 issue here, are not involved in the *Old Chief* analysis. In *Joiner,* the Court held that abuse of discretion rather than a heightened standard of review applied

to the exclusion of expert testimony under Rule 702 or *Daubert*. *General Electric Co. v. Joiner,* 522 U.S. 136, 143 (1997). Such a specious argument ignores this Court's teachings as to the heighten scrutiny required any time punitive damages are at issue. Review of a *Daubert* (Rule 702) analysis of whether scientific evidence is relevant and reliable is not at all the same as a Rule 403 ruling to exclude highly relevant state of mind evidence in a punitive damages case.

Contrary to respondent's suggestion, the *Joiner* case does not preclude a heightened standard of review for punitive damages evidence. It is true because it is not the same in fact or in kind as review of a *Daubert* ruling on expert testimony. Rule 702 is not an extraordinary remedy like Rule 403. *Joiner* did not involve state of mind evidence rebutting punitive damages. *Joiner* was a lung cancer case involving alleged PCB exposure that addressed exclusion of expert testimony based on irrelevant animal and epidemiological studies. *Joiner*, 522 U.S. at 143-44. The trial court excluded this evidence because the studies did not support the proffered testimony. *Joiner*, 522 U.S. at 143-44. It was not relevant. It cannot be argued that the excluded evidence in this case was irrelevant.

Thus, respondent makes an erroneous comparison between relevant state of mind evidence in a punitive damages case and the admission of an expert opinion under Federal Rule of Evidence 702. There is no comparison. The only similarity is the trial court's role as gatekeeper with respect to evidence. The analyses of and the standards to determine admissibility of the two types of evidence, however, should not and cannot be the same. Respondent's arguments are outside the realm of the issues presented to this Court by Crown. Respondent without any rationale erroneously asks this Court to apply the *Joiner* analysis here.

Crown does not seek a rule that categorically distinguishes between decisions allowing relevant state of mind evidence and decisions disallowing it. Rather, Crown urges a rule, which the Constitution and case law support, of absolute admissibility of

relevant, non-cumulative state of mind evidence on the issue of punitive damages. Crown does not seek to eliminate trial court discretion. Rather, it seeks a rule that prohibits trial courts from arbitrarily excluding relevant, non-cumulative punitive damages evidence. Just as an award of punitive damages merits greater scrutiny than an actual damages award, evidence bearing on punitive damages issues requires heightened scrutiny at all levels. *See Campbell*, 123 S. Ct. at 1520-21.

Consistent with this Court's rules, Crown will not repeat the arguments it made in its Petition. Crown, however, must respond to the mischaracterization of the evidence and dispute presented here. Contrary to respondent's representations, the trial court precluded Crown from showing the jury the critical information it relied on when making its design decision. Crown offered this evidence to educate the jury about its thought process in making its design decisions for punitive damages purposes only. This evidence was crucial to rebut respondent's arguments and speculative testimony about the addition of doors to lift trucks. Crown did not offer this evidence to show it took steps to discover some defect in its products as respondent contends. It offered this critical evidence to show it made a good-faith design decision to protect the safety of lift truck operators. If this evidence was not relevant and highly probative, then no exculpatory state of mind evidence could ever be.

This Court's precedents mandate exacting appellate review or *de novo* review of a trial court's application of the *Gore* guideposts to a jury's punitive damages award. *Campbell*, 123 S. Ct. at 1520-21. As indicated in Black's Law Dictionary, an appeal *de novo* or *de novo* review means, "the Appellate Court uses the trial court's records but reviews the evidence and law without deference to the trial court's rulings." The Ninth Circuit was required to apply this exacting scrutiny to the trial court's exclusion of Crown's highly probative punitive damages evidence. It completely failed to do so. Respondent's attempt to distinguish the analysis of the amount of a punitive damages award from the analysis of punitive damages evidence

is unsupported and unsupportable. *Campbell*, 123 S. Ct. at 1520-21. Such effort is unfounded and contradicts this Court's holdings in *Campbell*. Respondent's arguments that an abuse of discretion standard applies, despite the Courts' decisions in *Campbell* and *Gore* make Crown's case that its petition should be granted. Without the appropriate evidence and procedural safeguards, a punitive damages award constitutes an arbitrary punishment, which violates both the Due Process Clause and Fourteenth Amendment. *See Campbell*, 123 S. Ct. at 1519-20. Respondent cites language of the district court concluding that on the record the jury reasonably could have denied an award of punitive damages. This shows that the punitive damages award was not based on clear and convincing evidence, and is arbitrary, especially when considering the highly probative state of mind evidence improperly excluded. For these reasons, Crown continues to challenge, as it must, the Ninth Circuit's and trial court's decisions.

Respondent's opposition brief does not present any argument that defeats Crown's Petition. The arguments made and authorities cited do not establish that there is settled law on these issues or that the Court of Appeals and trial court properly evaluated the punitive damages evidence in this case. It was a violation of Rule 403 and due process to exclude Crown's highly probative, exculpatory state of mind of evidence. The Court of Appeals applied the wrong standard and reached the wrong conclusion. Crown has presented legal and constitutional issues of great importance to this Court and to the judicial process, all of which are consistent with and will provide critical clarification of this Court's recent punitive damages opinions. Crown's arguments are also consistent with the letter and purpose of Rule 403. Respondent has failed to reply directly to Crown's arguments or distinguish the precedent Crown relied on because he cannot.

## CONCLUSION

Crown's Petition presents important issues for this Court's consideration, and it should be granted.

Respectfully submitted,

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